Pages 1 - 34

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE RICHARD SEEBORG

MEDIOSTREAM, INC., Plaintiff, VS. MICROSOFT CORPORATION, et al, Defendants.	NO. C 11-2525 RS San Francisco, California Thursday September 1, 2011 10:00 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

BYRON COOPER, ESQ.
530 Lytton Avenue
Suite 200
Palo Alto, California 94302

Capshaw DeRieux, LLP
114 E. Commerce Avenue
Gladewater, Texas 75646
BY: JOHN LORD, ESQ.

For Defendant Microsoft:

Covington & Burling
One Front Street
35th Floor
San Francisco, California 94111
BY: SCOTT SCHRADER, ESQ.
ROBERT WILLIAMS, ESQ.

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported By: *Debra L. Pas, CSR 11916, CRR, RMR, RPR*
Official Reporter - US District Court
Computerized Transcription By Eclipse

APPEARANCES: (CONTINUED)

For Defendant Microsoft:
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
BY: GEORGE PAPPAS, ESQ.
RICHARD RAINEY, ESQ.

For Defendant Apple Computer:
Milbank, Tweed, Hadley & McCloy LLP
601 South Figueroa Street
30th Floor
Los Angeles, California 90017
BY: MARK SCARSI, ESQ.

For Defendant Sony Corp.
Kenyon & Kenyon, LLP
One Broadway
New York, New York 10004
BY: LEWIS POPOVSKI, ESQ.

For Defendant Asus Computer:
Turner Boyd, LLP
2570 W. El Camino Real
Suite 380
Mountain View, California 94040
BY: JOSHUA MASUR, ESQ.

For Defendant ACER America Corp.:
K&L Gates
Four Embarcadero Center
Suite 1200
San Francisco, California 94111
BY: HOLLY HOGAN, ESQ.

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

APPEARANCES: (CONTINUED)

For Defendant Dell, Inc.
Baker Botts, LLP
910 Louisiana Street
Houston, Texas 77002
BY: ROGER FULGHUM

For Defendant Sonic Solutions:
Farella, Braun & Martel LLP
235 Montgomery Street
17th Floor
San Francisco, California 94104
BY: RODERICK THOMPSON, ESQ.

ALSO PRESENT:
Richard Lytle, Esq.
Microsoft Corporation

Dr. Cheng Kao
MedioStream, Inc.

_ _ _ _

P R O C E E D I N G S

SEPTEMBER 1, 2011 **10:06 a.m.**

THE CLERK: Calling C11-2525 MedioStream, Inc. versus Microsoft Corporation, et al.

THE COURT: This is quite a contingent for a case management conference. You can stay in place as you make your appearances, but speak up.

MR. COOPER: Good morning, your Honor. Brian Cooper, for plaintiff. I have here with me John Lord, who is with the Capshaw firm, and MedioStream's president Dr. Cheng Kao.

THE COURT: Good morning.

MR. SCHRADER: Good morning, your Honor. Scott Schrader from Covington and Burling for Microsoft. With me is lead counsel, Mr. George Pappas, from our D.C. office who has been admitted pro hac vice. We also have Richard Rainey, also from our D.C. office in the back, who has also been admitted pro hac. And Rob Williams, he's also from our San Francisco office. And, also, Mr. Robert Lytle, who is in-house counsel with Microsoft.

MR. SCARSI: Good morning, your Honor. Mark Scarsi from Milbank, Tweed on behalf of Apple.

MR. POPOVSKI: Good morning, your Honor. Louis Popovski, Kenyon and Kenyon, representing the Sony defendants.

MR. MASUR: Good morning, your Honor. Joshua Masur

Turner and Boyd, for Asus Computer International.

MS. HOGAN: Good morning, your Honor. Holly Hogan from K&L Gates representing Acer America and Gateway.

MR. FULGHUM: Good morning, your Honor. Roger Fulghum from Baker Botts representing Dell, Inc.

MR. THOMPSON: Your Honor, one more. Sorry. Rod Thompson representing Sonic Solutions, LLC. Good morning, your Honor.

THE COURT: Good morning.

There are two things on the agenda today, first of which is the pending motion regarding, as I understand it, the source code, Apple's source code and where it may go. And then we have the case management conference.

Let's start with the motion. Let me also tell you, just as a matter of general practice -- please make yourself comfortable -- I will certainly address that motion today.

To the extent that there are ongoing discovery motions, and I suspect that there will be, my practice, consistent with most of my colleagues, is that will be referred to a magistrate judge. So I will not be doing the discovery motion practice. But as I say, this one I will address today.

I know these cases come to me with some history in Texas. So I have gotten the background. You know that I had issued an earlier order in this case when it was first assigned to me regarding a stay request and the like, so I have some --

some understanding of where things stand.

But let's start with the -- as I understand it, the motion, which is a motion for a protective order brought by Apple with respect to the source code that up to this point has been domiciled, if you will, on computers located at the Goodwin Procter firm, that I understand now is seeking to depart the scene. And so what we do with respect to the housing of the source code, seems to be the question. Is that the motion that's pending?

MR. SCARSI: That's correct, your Honor, yes.

THE COURT: Who is going to address the question?

MR. SCARSI: I do, your Honor.

THE COURT: And, also, from the plaintiff's side, who MedioStream's side, who wants to address it?

So where do things stand?

MR. SCARSI: Well, to start off, your Honor, the protective order in this case is unlike protective orders in most other cases where software is at issue. Most cases allow a party producing software to make it available for inspection under their custody and control. In fact, that's the standard order in the Northern District of State of California and, in fact, after Judge Everingham entered our protective order, the Eastern District adopted a standard order just like the Northern District of California.

So the Eastern District's current standing order

requires the producing party to make it available under their own control. So our protective order is completely opposite of what's done in every other case.

Why did that happen? At the beginning of the case the plaintiff argued that they needed 24-hour access to the software because they had so many defendants, so many products, they were never going to be able to put together their infringement contentions if they didn't have 24-hour access. We offered to give them extended hours, made a number of concessions, but ultimately the judge ruled against us.

Since that time Apple has provided MedioStream with six separate source code computers, each one having various versions of source code on it and they have been housed at Goodwin Procter's office in the Silicon Valley. We have -- over that time, over the couple years where the software has been there, we have helped to maintain it. So if there is issues with the source code, they needed something else, there were problems with the machines, they needed help finding something, we would send somebody down there usually the same day, and we made probably a couple dozen trips down there to help maintain the source code.

So now Goodwin wants to withdraw from the case, and what MedioStream has asked is that the source code computers be shipped to Susman Godfrey in their Houston office, and to us it doesn't make sense for a couple reasons.

One, the big rush is over. The 24-hour access no longer seems necessary. It also seems that now is an appropriate time to sort of write our protective order, to get it in line with every other protective order.

And it also seems to us, from a logistics standpoint, it would be much more difficult for us to provide the support we've provided if we had to send somebody to Houston in order to fix something or to download new software.

Plus MedioStream's lead counsel is -- was resident in the Silicon Valley area. We are not dealing with lead counsel that is out of the jurisdiction. Everybody is in the Silicon Valley area, your Honor, that's why the case ended up here. It makes no sense to send everything to Houston.

The Susman lawyers, I'm not sure what their involvement will be in the case, but certainly we've gotten past the big crunch of infringement contentions. We're now at a point where it does make sense to re-look at the protective order.

And to us it just seems from a logistics standpoint moving the software from here, Silicon Valley area where we can help maintain it, to Houston just seems, one, not very secure and; two, doesn't make a lot of sense from a logistics standpoint.

THE COURT: Okay.

MR. COOPER: I will try to be brief here, your Honor.

The protective order covers all this. It requires that the source code be produced to counsel for the other side for safekeeping in their office. MedioStream has produced its source code to counsel all over the country. Sony, for, example has produced its source code to MedioStream's counsel both in their New York office and in their office here.

The only party that is now making an objection to that is Apple. And we believe that as long as Goodwin withdraws, it should go to MedioStream's counsel's office, wherever that is. Apple does not have the right to choose where our counsel lives.

THE COURT: But you have local counsel. You have to. You're here.

MR. COOPER: That's right, your Honor.

THE COURT: Why can't it stay in the Northern District of California?

MR. COOPER: Well, your Honor, I would be perfectly willing to take care of the code here as well. And if the code has to stay within this district, I can provide a place for that for safekeeping.

THE COURT: I don't see -- I mean, to some extent geography is of less consequence than it used to be in terms of these issues, but I don't see why it should -- it's not so much that it must stay here. I don't see why it should go to Houston. It doesn't make any sense to me why you would -- the

issue of whether or not the protective order that was entered in the -- by the Court in Texas is somehow out you of sync with the standard approach in the Northern District. I tend to agree with you that the way, in my experience, it operates is consistent with what you said. We don't have any standard -- we have template protective orders which provide guidance to counsel. We don't have a standing order, if you will, that source code can be treated in a particular fashion.

So I don't think I go quite as far as you are suggesting maybe is the case. I think you're right that in the past I have operated consistent with the way Apple is suggesting we operate.

However, the protective order is what it is. It's in place. I am somewhat disinclined to revisit it and start from scratch. But I'm also disinclined to send the source code out of this district because I don't see any reason why we should do it.

So, my reaction is it should -- if Goodwin Procter is departing the scene -- and I know I haven't signed off, but I will, to allow them to depart -- I would think that it should go to counsel within the district representing plaintiff and then you can work out the logistics at that point in time. I mean, that's my inclination.

MR. SCARSI: And the only issue we have with that, your Honor, is we would like it to be -- we, obviously, didn't

want it to go to plaintiff's -- to counsel of record in the underlying case. It went to Goodwin Procter. Goodwin Procter was in sort of a big office building, 24-hour security, all of those things. We would like to make sure that if it stays in -- if it goes somewhere else, that, again, it's in a secure building with all of the sort of -- secure building with 24-hour security, all those sorts of things that Goodwin Procter.

THE COURT: Which of the offices -- you're Mr. Cooper?

MR. COOPER: That's correct, your Honor.

THE COURT: Mr. Cooper, counsel who will be representing MedioStream in this district, is it -- are you the representative or are there additional counsel that have offices in this district?

MR. COOPER: I am the counsel, your Honor, and I will have to arrange for space either within Goodwin or somewhere else. So that, in fact, what will likely happen is that the computers will be maintained at Goodwin and I will arrange something with Goodwin so they are kept in the same manner that they are currently kept in.

THE COURT: They won't move. They will stay right where they are?

MR. COOPER: That is right, your Honor.

THE COURT: Goodwin Procter just won't be counsel any

more.

Do you have any problem with that?

MR. SCARSI: Obviously, we would like to move them to our own counsel's offices, but if your Honor is inclined to have them stay there, that's fine.

And I just want to represent to the Court and to Mr. Cooper, Apple has got relationships with lots of law firms in the Silicon Valley area and Apple is perfectly willing to put it in a law firm at its own cost that's convenient to Mr. Cooper. So he doesn't even need to go to the expense of paying Goodwin Procter to maintain it there. We could put it in a number of different counsel's offices. We can offer him access during normal business hours even --

THE COURT: You know, this issue seems to me to be one that shouldn't be -- counsel shouldn't be spending a lot of time discussing. I mean, there is no tactical or strategic advantage, particularly in light of my decision it stays within the district.

I think we ought to do what's the most convenient, addressing security concerns, but is the most convenient for both sides. And I will expect you to operate professionally and provide access and the like. And, you know, where these particular computers are located seems to me to be an issue that we don't want to spend a whole lot of time on.

So I think you ought to meet-and-confer and if there

is another spot that is just as good and you don't have to pay rent or whatever, why don't you just work it out? It's not worth a lot of fighting.

MR. COOPER: Agreed, your Honor.

THE COURT: The issue was whether or not I would let it go to Houston, and I won't. So once that's done, I think you guys ought to just kind of work it out.

MR. SCARSI: Thank you very much, your Honor.

MR. COOPER: Thank you, your Honor.

THE COURT: Okay. Now, with respect to the case management conference, you know, I'm aware that we -- what I have in front of me, as I understand it, is that there are three related cases that are now assigned to me, and in two of those three there's a stipulated stay, as I understand it; is that correct?

MR. COOPER: That's correct, your Honor.

THE COURT: So we're talking about the third case, if you will, which I guess is the earliest case; is that also correct?

MR. COOPER: That's correct, your Honor.

MR. SCHRADER: That's correct, your Honor.

THE COURT: And that had gotten a long way along the path in the Eastern District of Texas, and then there was the litigation up the line and off it -- off it gets sent to me.

I guess my question is: Could you highlight for

me -- I did go through your statement, the statement, but highlight where the dispute is with an understanding that, as you all are aware, my calendar is such that you're looking at the earliest late 2012 to begin with.

So with that understanding where -- where is the points of contention in terms of scheduling and the like? I understand that the defendants are saying you should stay the whole thing pending the determination on this, the appeal of the PTO's reexamination efforts. And the plaintiffs are saying no, you should schedule now.

I guess I'm not quite clear on what -- if I -- whichever path I take at the end of the day, it's going to make that much difference. I suppose in terms of whether or not discovery can continue, it would have some consequence, but my understanding was mostly that discovery has been completed. So I guess I'm not clear on what consequence will flow from going one way or the other way in this instance.

So why don't we start with you, Mr. Cooper? And then we will go to you.

MR. COOPER: Very well. Thank you, your Honor. Thank you for the order, your Honor.

I realize that this Court is very busy and we would like to set a schedule that places the least burden on this Court. MedioStream is prepared to offer to stay this case, if all the defendants will stipulate to be bound by what happens

in the *Inter Partes* proceedings. Right now we only have one party, Apple, who is in that proceeding. It is proceeding on one prior art reference. All the other defendants are claiming they then have the right to file other *Inter Partes* proceedings. If they are willing to be bound by the outcome, then we can have no burden on this Court. We will stipulate to stay this pending the final outcome.

THE COURT: Well, but the notion that other parties may weigh into the fray, that -- it isn't automatic in my mind that even if the action vis-a-vis Apple is stayed, that I would automatically say, "Oh, another party brings some proceeding in the PTO. You get an automatic stay."

I mean, so the concern that you're expressing, I don't know if that concern flows from what you think would happen if there was a stay vis-a-vis Apple. I mean, my understanding is that Apple is fairly far along in this case, and the PTO has rendered its determination on reexamination, and the question is now the appellate process.

But that pertains to Apple. And so if another defendant seeks reexam or some other proceeding in the PTO, it wouldn't automatically follow that everything would be stayed pending the conclusion of that activity.

MR. COOPER: Right, your Honor. Essentially what I would -- what MedioStream would like is that if we're going to stay the proceeding pending what happens in the *Inter Partes*

reexam, that all the parties be bound --

THE COURT: Why do you need a commitment from them? In other words, is the commitment that you're seeking so that -- so that once the litigation with respect to Apple's reexamination process is concluded, you don't face further stays? Or what is it -- why are you asking everybody else to be bound?

MR. COOPER: To make sure, your Honor, that it's clear that all the parties are bound. Therefore, they have no right during that process, or afterwards, to file their own *Inter Partes* proceedings. And when those proceedings --

THE COURT: I see what you're saying.

MR. COOPER: When those proceedings are done, we're not still litigating the same issues by other parties. So that it's clear that this Court was not burdened. We proceeded in the Patent Office and what happened in the Patent Office is final as to all the parties.

THE COURT: Well --

MR. PAPPAS: George Pappas on behalf of Microsoft, your Honor.

I'm addressing the global issues on the schedule. And any questions you have, counsel for the other parties are here to address issues as they come up.

Your Honor, simply put, I don't think -- certainly, as to Microsoft. We're not in a position to agree to be bound

by what happens in the Apple reexam. Your Honor is quite correct that the only *Inter Partes* reexamination pending at this time is one that was filed by Apple largely, and almost exclusively, placed on some cleaner prior art, that's the name of the product there was material on. And there's other prior art out there.

So I think, your Honor, what -- we understand your Honor's ruling on our motion to stay was without prejudice, but I think our purpose in being here today, and all of my co-defense counsel, is that we think that the position of this case before the Patent Office is such that the best useful judicial resources is to, in effect, do a stay and to give the board time to rule.

THE COURT: And that, though, gets to my earlier question about my own schedule. I guess I'm not necessarily seeing the difference between my scheduling a late 2012 or early 2013 trial and a stay, unless it's that the discovery and the like is the one consequence.

Otherwise, it's really the same thing because from your calculation, at least the ones that I read -- the one I read in the joint statement is your expectation is if all goes well, you will have a determination before the trial date.

MR. PAPPAS: That's correct, your Honor.

THE COURT: So to some extent -- you know, the danger of not setting a trial date is you fall further and further

behind. It's the reality of life here. And that may not trouble you, but it will trouble the plaintiffs.

So, and your concern as to why everything should be stayed is to allow the re-examination process to play itself out. And we may be able to accommodate both of those by setting a trial date in early 2013.

MR. PAPPAS: Your Honor, I think -- if I can address that, I think we can -- may I hand something up your Honor that I think summarizes what was in our statistics?

THE COURT: Sure.

MR. PAPPAS: I have given one to the other side. May I give would be to your law clerk as well, your Honor?

THE COURT: Sure.

(Whereupon, document was tendered to the Court.)

MR. PAPPAS: Your Honor, what we've done in response to your order -- and I think this exhibit will help frame the issues and answer your question -- is your Honor asked us to discuss what remains to be done in the case and, also, to give our best estimates as to when a decision will be done.

THE COURT: Which I realize is reading the tea leaves to some extent. I have been in this business long enough to know an estimate is an estimate, and who knows.

MR. PAPPAS: I understand, your Honor, but I think what we've done is in response to your order, Mr. Zapf, my

colleague, spent about two-and-a-half days combing through actual data and statistics from the board to try to give your Honor some assistance so that we're doing more than speculating and making an educated assumption.

And what we show on this exhibit is you have the right of appeal notice on the '655 patent that was February 14, 2011, and the right of appeal notice on the '172 patent that was January 28, 2011.

Now, those dates are important, your Honor, to ground us because that tells you, in effect, when the Patent Examination Office declared their action final and issued an appeal notice. So now MedioStream is on its way to the Board of Patent Appeals and Interferences.

One thing I think to appreciate, very briefly -- although if there's any questions in depth about the reexam, Mr. Scarsi can handle them -- is these patents that are before you, '172 and the '655, have been examined now three times by three examiners and found invalid.

Now, what we then looked at was, first, Mr. Zapf looked at, well, what's the median time? So we took the year period from August 2010 to August 2011, right before we filed with your Honor, to get the most recent data and the methodology set forth in Mr. Zapf's affidavit.

All right. Let me just come to the conclusions, which I think help. What we found was the median time to a

board decision that took place in this one-year period was 18.2 months, which means -- again, "median" means some moved faster, some moved slower; but nevertheless we would expect a decision from the board by August of 2012.

Now, we didn't want to just stop there because as statistics and numbers are, we think it helps to look at the data in a different way. So Mr. Zapf, in consultation with me, said: Well can we give the judge some indication of when a substantial portion of the reexamination appeals are decided by the board? So 75 percent was chosen. That's an assumption by us, but we thought it was a fair assumption because it tells you when we can expect three out of the four cases to be decided by the board. What we found is, again during that one-year period from August 2010 to August 2011, is that 75 percent of the board decisions were rendered in a 23-month period, which would bring us to January of 2013.

That leads us, your Honor, therefore, to our statement in the CMC that if your Honor is inclined not to stay the case, which is the source of our original motion, that a trial date be chosen in the March 2013 time period and our schedule works back from there.

Now, but there is something else I'd like to address that I think balances the parties' interests, which is that in that interim period, at least up until next July when we propose a case management statement, that your Honor would

actually enter what would be called a stay for that period of time.

Your Honor may ask, What's the difference, Mr. Pappas, whether I call it a stay or I just embody the scheduling that you have proposed, that the defendants have proposed into an order? And the answer, your Honor, is found in -- we believe in the manual *Patent Examining Procedure*, which we cover on Page 11, which basically says in a nutshell that if we are able to present a stay for any period of time to the Patent Office, particularly in the current status of appeal, that they will take up our case with all dispatch.

Simply put, your Honor, working through this maze of regulations, we think that a stay by your Honor for some period of time, even if it's just till July of 2012, would allow us to encourage the Patent Office to act pursuant to their rules with dispatch, thereby giving us a high likelihood -- or a higher likelihood that we would have a decision by that time.

And so, your Honor, that is the reason for our proposal. And we could then set a status conference with you for July 2012, as we proposed, and at that time the remaining discovery and other proceedings could be completed.

Now, let me address, your Honor, if I may, why we disagree with the plaintiff's proposition insofar as their schedule. Their schedule basically that they have proposed would have a very substantial amount of work done between now

and July -- excuse me, February of 2012 and then there would be about a six or seven-month hiatus until their proposed October 2012 trial date. What that really amounts to, your Honor, is a request to start these proceedings, which have already been enormously expensive for all parties, then stop and then start again.

THE COURT: How much is left to do? I mean, remind me of the point you had reached in Texas. Is there -- did discovery close?

MR. PAPPAS: Your Honor, I can tell you briefly what remains to be done. There are the six outstanding motions that are on Page 6. And there is -- the parties agree that there is -- rebuttal expert reports need to be served, and then dispositive motions need to take place, and then other pretrial procedures that are set forth on Page 8, your Honor. These are further pretrial proceedings numbers one through seven. These are ones on which all parties agree.

I do want to address, though, that at least as to Microsoft, your Honor, there is some remaining fact discovery to be done, but I want to stress --

THE COURT: But that would be by leave of Court because the time has run.

MR. PAPPAS: It would be by leave of Court, your Honor.

THE COURT: Obviously, if you would prevail on some

of these pending motions -- some of them are discovery motions, so those would result in additional discovery should whichever side is seeking the discovery prevails.

MR. PAPPAS: Exactly, your Honor. But I do want to give you the flavor of those though.

First of all, the limited fact discovery, and most of them -- most of the discovery we were talking about, limited as it is, arise out of the following general statement of facts. October 15, 2010 was the close of fact discovery in the case in Texas and thereafter we got allegations of new products infringed. The allegations it made earlier, but they were allowed in by Judge Everingham on October 18, three days after the close of fact discovery. So at that time we found that Microsoft's products in server operating systems, as yet unnamed, although there are many, they would involve Movie Maker and DVD Maker, were then added to the case. So that was three days after.

Four days later we get an expert report from a Dr. Foley, and for the first time, for the first time MedioStream alleges that DirectX, which is a form of code, along with our software development kits also infringe.

So in an essence, our discovery, as I said limited as it is in fact discovery, emanates basically from the proposition that products and allegations as to source code were added to the case after the close of fact discovery or in

one case for the first time in an expert report.

But, your Honor, that can be addressed, it seems to me, to the magistrate judge to whom decides and it also can be addressed, your Honor, within the terms of our schedule. But I think -- therefore, I think that if your Honor is not inclined to revisit the stay that you denied without prejudice, which we would ask you to do, we would ask you to adopt the option that we have proposed. It would balance the interests of the parties. It would make a spring -- a March 2013 trial date. It would give the parties the benefit of not having to do supplemental expert reports and other remaining fact discovery and to tax the Court with motions that may never be necessary. Not only not necessary --

THE COURT: Stay light is what you're saying.

MR. PAPPAS: Stay light.

The other thing is, your Honor, I think that things may change, and that's what we object to, the plaintiff's proposed schedule. If a party is doing a lot of work between now and February, there could be, of course, the -- the board's decision could make that all a very unnecessary and costly exercise.

Number two, motions and expert reports may have to be revised depending on what happens in the interim. For example, the *Therasense* case was decided recently en banc by the Federal Circuit. Well, the reports in virtually a number of patents

cases are now being rewritten in what -- on inequitable conduct in light of that.

The *Unilock* decision came about on damages after the plaintiff's expert reports. Ours aren't done yet, because we haven't done rebuttal reports. But that pretty much puts to rest this idea that you have to show a direct linkage between the alleged patented improvement and the demand for the product.

To say that the Federal Circuit is active in these issues might be the understatement of the day. But it seems to me that unnecessary resource is being expended, both by the Court and the parties, to do that.

And then perhaps the last thing I'll say on this point, your Honor, is I would be remiss to my codefendants and my client to not stress this one factor. As we stand here today, these patents are gone. They are invalid.

THE COURT: I understand --

MR. PAPPAS: The Patent Office, in effect, said we have made a mistake. They should never have issued.

THE COURT: I recognize that there has been activity in the PTO and as, you may know from looking at decisions in other cases, I tend not to stay proceedings while I await activity in D.C.

But this, in this instance, it's further along than often is the case when that issue is presented to me. So it is

a slightly different circumstance.

So I'm fully aware of the status of the proceedings in the administrative part of this process.

MR. PAPPAS: But what a stay light may do, your Honor, a stay light as you have called it, it may give us some assistance in moving the Patent Office along.

And I think we could agree here today, even based on Mr. Cooper's earlier statement about everybody being bound by the Apple re-exam. I think we could all agree that justice would be served if the schedule works in a way that we get the board's decision.

THE COURT: Right. Although your premise that somehow the speed with which things will occur in Washington will be impacted by whether or not I stay or don't or stay in part or stay for a certain period.

I'm not saying that I have any reason -- you would know better than I -- but I'm not aware of the fact that they paid much attention to that, but maybe they do. I don't know.

MR. PAPPAS: Your Honor, I'm just reading their rules.

THE COURT: Is it in the rules that if a District Court somewhere stays a pending patent matter where the same patents are at issue, that they will speed things up? It's interesting. I didn't know that.

MR. PAPPAS: Your Honor, I can only quote to you from

the provision that we have in Page 11. That seems to indicate to us that they will expedite the matter.

MR. COOPER: If I may, your Honor?

THE COURT: Yes, Mr. Cooper.

MR. COOPER: I took a look at that provision in the MPEP and that's not what it says. And I'm not aware of any such rule either.

THE COURT: Okay. Well, why don't you go ahead now. You have the floor. Then just give me your input on what you just heard.

MR. COOPER: Your Honor, I could argue against a lot of this stuff. I won't burden the Court with that.

I will note for their statistics though, their statistics relate to decisions, and decisions from the time that the right of appeal letter is sent til the time that there is a decision. But, your Honor, that only includes about 50 percent of the cases because the other 50 percent never get document docketed. And as a result of that, they are sent back and they are actually prosecuted further.

So far an answer has not been served by the PTO. Even after an answer is served, only 50 percent of those cases are actually docketed. But let me short-circuit that, your Honor, and get to the point of a schedule that won't burden this Court, that will put the least burden on the parties.

We will take whatever trial date is most convenient

for this Court. What we do need to do, however, is finish expert discovery because the experts are third parties. These are prominent professors around the county who cleared their schedules for a trial in January of this year and then told a month before that trial that there won't be one. And now they're waiting for the date --

THE COURT: Which I will point out it's not our fault. This time it's another Court that did that. I have only had this case since the summer, beginning of the summer -- end of spring, I suppose is better. Go ahead.

MR. COOPER: So, your Honor, I would like a schedule that provides those experts some certainty. The completion of the rebuttal expert reports, their depositions and close of expert discovery for this case. That gives them some certainty and the setting of a trial date so they can clear their schedule once begin for that trial date so that we're not burdening them with a constantly shifting schedule.

THE COURT: I appreciate that and am inclined to be able to accommodate you with that.

But the point that Mr. Pappas makes, that for a stand-down period, call it a stay, call it what you will -- I guess in reaction to his comment, if you say get a trial date in the earlier part of 2013, why do you need to do all this before the summer 2012? I mean, there is a lot of benefit, I would think, to having it closer in time to any trial that may

occur. It may -- how things development, you know, who knows, maybe you won't have to expend all that work one way or another. Doesn't that make sense?

MR. COOPER: Your Honor, what I'm trying to balance here is the burden on the parties with the burden on these experts. These experts are teaching. They are doing a lot of other things.

THE CLERK: I can give them certainty by saying, "Okay, March 2013 is your trial date." You calculate, build it into your schedule. You will have certainty. But why should they report exchange, the depositions of experts and the like, why should that take place sooner rather than later relating back that you're not going to go to trial until 2013.

I mean, it would be a different proposition if there hadn't been anything done in the case, but it looks to me as if it's a fairly -- for a patent case anyway, a fairly limited amount of remaining work that you need to do. So you have plenty of time to do it from middle 2012, if you have a trial date at the beginning of 2013. So why rush it, I guess is my question?

MR. COOPER: Well, your Honor, it's a matter of finishing the experts' work. We're halfway throughout that period now. We're geared up. They studied everything. We had tons of meetings, they produced one report that's hundreds of pages. And we're about to produce the other one and everything

just stopped.

Now, we're going to have to meet again. They're going to have to set a schedule. And what they are asking me is: We need some certainty. We need a schedule by which we can do all this.

It's fresh in their minds now. Of course, it's been some months, but now we're going to say what you did instead of completing it eight months after the fact, we're going to do it in another year. So we're going to have to meet even longer.

I realize that --

THE COURT: Well, yeah, but you mean the refresher meeting may take a little longer, but the benefit you get, as Mr. Pappas suggested, this is a very dynamic area of practice and there will be all sorts of -- guidance we will get from the Federal Circuit in the meantime, maybe the Supreme Court.

It doesn't seem to me with the reality of the trial schedule -- putting aside each side's position on the speed with which they would like to operate, the reality is you're not going to be in trial until -- I mean the earliest would be late 2012, and it seems to me in light of the information that maybe early 2013 makes a bit more than sense. I don't see any reason why a stand-down period is not in everybody's interest.

I was disinclined on the stay out of the box. I don't like to stay cases for the uncertainties of what may happen in another forum. But in this instance I have to say I

am somewhat inclined towards the notion of some period -- not a stay all the way through until the trial date, but a stay for a blocked period of time, because I don't really see the reason why you should be -- either side should be expending a lot of money.

MR. COOPER: And, your Honor, we're willing to adjust the schedule to push everything else back; that is, if we can set a date for which the expert discovery close is so that we can finish the work with those experts and give them some certainty, and then set a trial date, and then as the defendants want to do, we'll have a CMC in the middle of next year. So between now and the middle of next year this Court would not have to do anything else. The parties can finish their work with their experts and the experts can be done --

THE COURT: This is going back to: Why do that now? Why expend -- then everything would stop for another six months or so. The nature of our world here is that then you would have to do some additional material because it's going to get stale.

I mean, why not take this hiatus, if you will, and start the process up again in perhaps July of 2012? It seems to make -- the more I think about it -- sense to me. And if it has some ancillary benefit of speeding the process along, I -- I'm not get to get into -- I don't have to rule on the question of whether or not the board is influenced by a stay or not,

fortunately; but if it has that additional salutary benefit of speeding them along, why not?

MR. COOPER: Your Honor, I don't think that that's the case.

THE COURT: Well --

MR. COOPER: What they have cited clearly doesn't state that. In fact --

THE COURT: What I'm saying, my point here -- sorry to interrupt you, but my point here is that whether or not it does, that's not the reason for doing it. If it has that impact on them in some form or another, the more the better. But the reason to have a stand-down is not to try to prod the board. It's because it doesn't make any sense to be expending a lot of time, effort and money before you're within the window of when you're going to be going to trial.

This is what I'm going to do. I don't know if anybody else wants to chime in before I way into the fray here.

(No response.)

I'm going to go ahead and set a trial date, and I will set it in early 2013. I don't have a particular date in mind, but I will go back and look at my schedule and set a date and I'm hoping that's far enough out so there won't be any problems and you can tell your experts and all that.

Then I am inclined to go ahead and have a stand-down period with a commencement again in July of 2012, where it

starts up again. Then I will build in a case management conference probably, oh, September of 2012. And in the meantime when it can start up again if there are motions that you need to then have addressed, discovery motions or other motions, then I will make the referral and you will get assigned to a magistrate judge.

But that's what I'm inclined to do. Then we'll build in all the other dates. They all flow from the trial date backwards. I will build those in, pretrial conference, dispositive motion, all of that.

MR. PAPPAS: Right, your Honor. That way after the CMC in July 2012, then we would take up any issues of remaining discovery and things like that. All right?

THE COURT: I know that's not what you're looking for, Mr. Cooper, but I actually don't think it prejudices your interests. I mean, I understand your concern is that you want certainty and you want to be able to get people organized and all of that, but I think that would be accomplished by this without its -- I recognize the delay is not the one you want, but it is where we stand in this place at the moment.

Okay. Anything else that we need to address today?

MR. PAPPAS: Nothing from the defendants.

MR. COOPER: No, your Honor.

THE COURT: All right. Thank you. Thank you very much.

(Whereupon, further proceedings in the above matter were adjourned.)

--oo--

CERTIFICATE OF REPORTER

I, DEBRA L. PAS, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 11 2525 RS, MEDIOSTREAM, INC. vs MICROSOFT CORP., et al were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Friday, September 16, 2011